NOT FOR PUBLICATION IN WEST'S BANKRUPTCY REPORTER:

In re Jacques de Groote, Case No. 02-00981.

Decision re Motion for Summary Judgment.

Decided February 23, 2005.

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The decision below is signed as a decision of the court.

Signed: February 23, 2005.

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
JACQUES DE GROOTE,	)	Case No. 02-00981
	)	(Chapter 11)
Debtor.	)	

DECISION RE MOTION FOR SUMMARY JUDGMENT

On the basis of *res judicata*, the debtor, Jacques de Groote, has moved for summary judgment on his objection to the amended proof of claim of Conseil Alain Aboudaram, S.A. ("CAASA"). The court will grant the motion.

I

CAASA holds two promissory notes executed by de Groote in its favor. One is dated December 19, 1995 for the principal sum of $400,000 "or, if less, the aggregate principal amount of all advances hereunder by the Lender to the Borrower (including advances made prior to the date hereof) . . . ." The other is dated October 13, 1998, with a face value of $100,000 subject to language similar to the first in all relevant regards. CAASA filed a civil action against de Groote in the United States District Court for the District of Columbia, Conseil Alain

Aboudaram, S.A. v. de Groote, Civil Action No. 01-00006 (JDB), an action assigned to the Honorable John D. Bates. Before the matter went to trial in the district court, de Groote commenced this bankruptcy case. CAASA moved for relief from the automatic stay of 11 U.S.C. § 362(a) to permit it to pursue the litigation of its claim in the district court, noting that "the adjudication of [the district court civil action] will liquidate the claims and make the administration and reorganization of the Debtor's affairs simpler." This court granted CAASA's motion to permit the district court civil action "to proceed to allow the District Court to reduce to judgment the amount of CAASA's and/or the Debtor's respective claims and counterclaims."

CAASA claimed at trial in the district court that it was owed $421,576.67 as unpaid principal, $96,902.58 in interest, and $1,863,348.41 in expenses of enforcement. Between 1994 and 1998, Alain Aboudaram (CAASA's principal owner) advanced $396,357.59 for de Groote's benefit, which de Groote agreed to repay. It is principally those advances that CAASA maintains were to be paid under the promissory notes. De Groote has not contested that he continues to owe repayment of the loans to Aboudaram, but challenges CAASA's view that the notes embodied those obligations. De Groote contends that only advances by CAASA itself were covered by the notes. Aboudaram himself has not asserted a claim in this bankruptcy case.

According to CAASA, the parties' agreement contemplated that de Groote would evidence his repayment obligations to Aboudaram, as well as repayment obligations to CAASA for amounts CAASA advanced to de Groote, with promissory notes payable to CAASA and would secure his repayment obligation by giving CAASA a mortgage on de Groote's townhouse in Washington, D.C. De Groote admits he signed the notes payable to CAASA, and admits he gave the agreed mortgage to CAASA. However, de Groote denied at trial that the promissory notes were to cover Aboudaram's personal advances, and maintained that the promissory notes were limited to amounts that CAASA itself advanced to him.

At trial, de Groote successfully objected to the introduction into evidence of amounts entered onto grids that had been attached to the promissory notes, apparently for recording advances made by Aboudaram personally. De Groote argued that the figures in the grids were not part of the documents he actually signed, and CAASA consented to their detachment from the promissory notes and exclusion from the record.

The district court also denied CAASA's oral motion in the midst of trial to add Aboudaram as a party plaintiff and to add a claim for breach of oral agreement.

The district court further precluded CAASA from presenting testimony from Aboudaram's daughter that Aboudaram had assigned his rights to CAASA or instructed it to collect his claim on his

behalf, because that evidence was not produced in discovery. The alleged assignments purportedly took place in 1998 or 1999, after the first note had been executed in 1995, and possibly after the second note was executed in 1998.[1] At oral argument in this court on de Groote's moton for summary judgment, CAASA maintained that Aboudaram testified in the district court that he assigned his claim to CAASA, but that the district court addressed the case in the context of the theory CAASA had elected to pursue, namely, strictly the promissory notes themselves, which CAASA believed embodied an assignment from de Groote.

CAASA asserts that the district court did not pass on any claim of assignment from Aboudaram other than with respect to CAASA's theory that the promissory notes embodied such an assignment. However, that stems from CAASA's conduct in the case. CAASA's complaint did not include an alternative claim that even if de Groote was not liable to CAASA under the promissory notes for advances by Aboudaram, de Groote was liable to CAASA for Aboudaram's advances based on Aboudaram's assignment of his claims to CAASA. Moreover, even after de Groote asserted that the promissory notes were limited to advances by CAASA and not those by Aboudaram, CAASA never moved to conform its complaint to the evidence to include a count for a claim based on

[1] This seems inconsistent with CAASA's contention that the promissory notes all along embodied an assignment from Aboudaram.

assignment of Aboudaram's claims to CAASA independent of the promissory notes themselves.

The court notes that the promissory notes included a provision for attorney's fees for enforcement, and were secured by de Groote's Washington townhouse. De Groote's obligations to Aboudaram, in contrast, have not been demonstrated to have included any such provisions. De Groote has exempted his Washington townhouse, and it is no longer part of his estate for purposes of this case, and is beyond the reach of his general unsecured creditors. So it was to CAASA's advantage (in order to be secured and to be entitled to costs of enforcement) to pursue a recovery on the theory that whatever assignment Aboudaram made to CAASA of his claims against de Groote were embodied in the promissory notes.

At the close of CAASA's case-in-chief, De Groote moved for judgment in his favor under F.R. Civ. P. 50(a) on the basis that the notes only covered advances by CAASA, but the district court reserved ruling on that motion and allowed the matter to be fully tried and submitted to the jury. The jury returned a verdict in favor of CAASA both as to its claims and de Groote's counterclaims. Pursuant to F.R. Civ. P. 50(b), de Groote renewed in open court his request for a ruling on the still pending motion for judgment in his favor. In response, six days later CAASA filed a motion to amend its complaint to conform to the

evidence. Specifically, it sought to add a count for reformation of the promissory notes (to treat the notes reformed to cover advances made by Aboudaram).

The district court concluded that de Groote had not consented to trial of the claim that the promissory notes failed accurately to capture the agreement between CAASA and de Groote, and so denied CAASA's motion. Further, the district court granted de Groote's motion for judgment in his favor despite the jury verdict in CAASA's favor. The notes covered only "advances hereunder by the Lender to the Borrower," and, as the district court noted, unequivocally defined CAASA as the Lender. The enforcement of the note obligations was governed by New York law, and the district court concluded that under New York law the unambiguous language "advances hereunder by the Lender" could not be altered by extrinsic evidence. Accordingly, the notes could be enforced only for advances by CAASA, not advances by Aboudaram. Because de Groote had paid CAASA amounts in excess of all amounts previously advanced by CAASA (some $25,000), the district court concluded that no obligation remained owing to CAASA.

CAASA then filed a motion for reconsideration of the granting of de Groote's motion for judgment in his favor. CAASA contended that the ruling should be altered because the voluminous record contained the grid which had been attached to

the promissory notes, and that de Groote's emphasis on the plain words of the promissory notes came too late in the game to be fairly considered by the court.

The district court found the grid insufficient to alter its conclusion that Aboudaram (and his personal advances) were a stranger to the plain language of the promissory notes, and noted that Aboudaram may have acted inconsistently with the notes by recording his personal advances to de Groote on the grid.

The claim of unfair surprise accused de Groote of fraudulent concealment of an entirely new and previously undisclosed defense: CAASA emphasized that not once in either the pre-suit years in which CAASA demanded payment of the notes or in the pretrial proceedings leading to trial did de Groote ever assert that he had no liability under the notes because the payments CAASA sought to recover had not been made under the notes, and that he only raised the issue after CAASA rested its case-in-

chief.[2] The district court found the claim of unfair surprise insufficient to set aside the granting of de Groote's motion. Mem. and Order of August 31, 2004 at 4 n.3 and at 5 n.5 (reciting that beyond the issue regarding the grid, "[n]one of the other issues mentioned by CAASA in its motion for reconsideration approach the 'clear error or manifest injustice' standard" for reconsidering a ruling.) A judgment dismissing both parties' claims ensued.

CAASA now attempts to purse its amended proof of claim on theories not advanced (or not allowed to be advanced) in the district court, including "an express written contract, an express oral contract, an implied in fact contract, and an implied in law contract, such as claims for money had and received, money lent, quasi contract or unjust enrichment." Tr.

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[2] CAASA further argued that vacating the ruling was justified because:

- CAASA's consent to detaching the grids from the promissory notes exhibits was procured under false pretenses;
- de Groote's springing his defense on CAASA only after it rested its case denied CAASA due process;
- equitable estoppel applied because de Groote's conduct prevented CAASA from knowing that he intended to raise a new text-based defense at the close of CAASA's case-in-chief; and
- judicial estoppel (including treating CAASA, not Aboudaram, as a creditor in his bankruptcy case, and failing to disclose his defense in discovery) precludes de Groote's defense.

of Dec. 14, 2004 at 39. However, the claims all relate to the same monies advanced to de Groote--principally by Aboudaram (and in much smaller part by CAASA itself)--as were involved in the district court action.

II

De Groote contends that *res judicata* (also known as claim preclusion) bars CAASA from asserting its amended proof of claim for the amounts it sought to recover in the district court. The "preclusive effect of federal court litigation is a question of federal law . . . ." Athridge v. Aetna Cas. & Sur. Co., 351 F.3d 1166, 1170 (D.C. Cir. 2003) (citation omitted).

The District court's judgment is a final judgment for *res judicata* purposes and the parties are the same. A final requirement for *res judicata* to apply is that CAASA's amended proof of claim asserts the same cause of action as the district court civil action. See Drake v. F.A.A., 291 F.3d 59, 66 (D.C. Cir. 2002). In addressing that requirement, this circuit follows "the *Restatement (Second) of Judgments*' pragmatic, transactional approach to determining what constitutes a cause of action." United States Indus., Inc. v. Blake Constr., Inc., 765 F.2d 195, 205 (D.C. Cir. 1985), citing I.A.M. Nat'l Pension Fund v. Inus. Gear Mfg., 723 F.2d 944, 949 n.5 (D.C. Cir. 1983). As observed in Apotex, Inc. V. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004):

> "Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of

> facts.'" Drake, 291 F.3d at 66 (quoting Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984)). In pursuing this inquiry, the court will consider "'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 723 F.2d 944, 949 n.5 (D.C. Cir. 1983) (quoting 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.410[a] (2d ed. 1983)).

Here, as in Apotek, CAASA:

> is simply raising a new legal theory. This is precisely what is barred by *res judicata*. See Drake, 291 F.3d at 66 ("[U]nder *res judicata*, 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action.'") (quoting Allen v. McMurray, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980)) (emphasis in original).

Accordingly, the doctrine of *res judicata* applies here unless CAASA fits within some exception to the doctrine.

The court of appeals, in dicta, has recognized exceptions to *res judicata* for claims that "would have been utterly impracticable to join" in the earlier action or that "could not have been anticipated when the first suit was filed," United States Indus., 765 F.2d at 205 n.21. CAASA's own conduct in the district court civil action demonstrates that it was not impracticable in the district court to pursue the theories it advances here. Those theories could have been advanced in the district court if CAASA had:

- not placed reliance solely on promissory notes that

facially dealt only with advances from CAASA;

- timely sought to assert a claim based on the alleged assignment by Aboudaram (and made timely disclosure of Aboudaram's daughter's knowledge regarding the alleged assignment from Aboudaram),
- not stipulated to the exclusion of the grid from the promissory notes received in evidence, and
- sought to amend its complaint before trial to assert an oral contract theory it sought to add only in the midst of trial and a reformation count it belatedly attempted to assert only after trial.

CAASA's new claim theories asserted here could, as well, have been anticipated when it filed its action. The promissory notes on their face were limited to amounts advanced by CAASA, and CAASA obviously needed a concession by de Groote or some other basis for having the notes extend to advances by Aboudaram. Through discovery in the district court, CAASA should have been able to discover that de Groote was not willing to concede that the notes covered advances by Aboudaram, and could have sought then to amend the complaint. Amendments to a complaint before trial are liberally granted, particularly when necessary to avoid the type of injustice that CAASA claims occurred here.

Whatever the court of appeals meant in its dicta in United States Indus. regarding claims that could not have been

anticipated when the first action was filed, it surely did not intend to immunize from *res judicata* a plaintiff's claim theories that "could have been raised in that action," the criterion laid down in Allen v. McCurry, 449 U.S. at 94, through the exercise of ordinary due diligence.[3] Accordingly, CAASA is barred from pursuing theories of recovery it ought to have known were necessary to protect its interests if de Groote failed to concede that the notes applied to advances by Aboudaram and not only to those by CAASA.

CAASA contends that the district court's judgment is limited to CAASA's claim against de Groote under the promissory notes. Although that was the only claim that CAASA asserted in the district court, it arose out of the same transaction, de Groote's receipt of moneys from Aboudaram and CAASA, and as discussed above that common nucleus of facts suffices to make *res judicata* applicable to CAASA's new theories advanced here in pursuit of CAASA's monetary claim.

Next, CAASA contends that de Groote prevented CAASA through fraud and deception from fully presenting his claims, thus making

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[3] See Howe v. Vaughn (In re Howe), 913 F.2d 1138, 1147 (5th Cir. 1990) ("The Howes argue that they should be allowed to pursue their claims because, although they may have been aware of the basic facts underlying their claims, they were not aware of the significance of those facts. We find the Howes' ignorance an inadequate excuse for their failure to raise their claims in the earlier proceedings. They do not suggest that the facts forming the basis of those claims were undiscoverable until after those proceedings.").

res judicata inapplicable, citing United States v. Throckmorton, 98 U.S. 61, 65-66 (1878). CAASA contends that de Groote engaged in a course of pre-litigation conduct (namely, that in the years preceding the action de Groote never articulated the position he took in trial, and that he took positions seemingly consistent with the opposite) which led CAASA to believe that de Groote acknowledged that the amounts advanced by Aboudaram were covered by the promissory notes owed CAASA. However, CAASA raised the same issues of alleged misconduct in its motion for reconsideration, and the district court concluded that none of the issues mentioned by CAASA in its motion for reconsideration approach the "clear error or manifest injustice" standard. CAASA ought not be allowed to have a second bite at that apple.[4] If the district court committed error, that can be raised in CAASA's pending appeal.

CAASA relies on Doe v. Allied Signal, Inc., 985 F.2d 908 (7th Cir. 1993), in arguing that de Groote's pre-litigation conduct should relieve it from the doctrine of *res judicata*. Its reliance is misplaced because there the court of appeals concluded that "even if Doe should have known the relevant facts for [the second action] at the filing of [the first

[4] In any event, the district court undoubtedly viewed CAASA's unfair surprise arguments as meritless because CAASA could have discovered de Groote's position through careful discovery, and I agree with that assessment.

action]--which she did not--she would have still been justified in not including fraud and breach claims in the first lawsuit." The court of appeals additionally suggested in Allied Signal that the dismissal of Doe's claims for negligence resulting in rape was not *res judicata* as to her fraud and breach claims because she did not know of the fraud and breach claims relating to her employment status until after the first action was filed albeit she learned of Allied's deception during the course of the first action. However, the court of appeals emphasized that Doe's fraud and breach claims could not have been asserted until she was damaged by way of dismissal of her first action. That is not true of CAASA's alternative theories of recovery here.

CAASA also contends that it lacked constitutionally adequate notice that de Groote would raise at trial the issue of the promissory notes being facially limited to CAASA's advances. However, CAASA raised that very argument in its failed motion for reconsideration. As a matter of due process, CAASA was entitled only to a full and fair opportunity to litigate its cause of action–-including all theories that would support recovery with respect to the transactions at issue. As the district court record and the district court's post-trial decisions demonstrate, CAASA had that full and fair opportunity.

CAASA argues that de Groote's success in preventing CAASA from amending its complaint in the district court bars de Groote

from raising *res judicata* as a defense, citing Lunsford v. Kosanke, 295 P.2d 432 (Cal. Ct. App. 1956) (described by CAASA as holding that "defendant's successful objection to admission of all evidence in plaintiff's case as outside scope of pleadings estopps defendant from asserting *res judicata* to bar second action pleading facts sought to be proved in first action"). The court declines to follow Lunsford as it is plainly at odds with the doctrine of *res judicata* as applied by more recent decisions of the United States Court of Appeals for the District of Columbia Circuit discussed above.[5]

III

Based on the foregoing, the court holds *res judicata* applicable to bar CAASA's assertion of its amended proof of claim.

[Signed and dated above.]
S. Martin Teel, Jr.
United States Bankruptcy Judge

[5] Similarly, Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398 (Cal. Ct. App. 1981), is not persuasive as there the defendant's successful opposition to the plaintiff's motion to consolidate for trial action A and action B was held, contrary to CAASA's assertion, **not** to have estopped the defendant from asserting *res judicata* to defeat action B after winning judgment in action A; instead, the court found that different "primary rights" were involved and held *res judicata* inapplicable on that basis.

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